

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVIS YOUNG,	§	
	§	
<i>Petitioner,</i>	§	
v.	§	CIVIL ACTION: H-05-1756
	§	
DOUGLAS DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division	§	
	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Davis Young's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 3).¹ Respondent has answered and moves for dismissal of the petition because it is barred by the statute of limitations (Dkt. 8). The court recommends that respondent's motion be granted and Young's application be denied.

BACKGROUND

Young pled guilty on May 11, 1999 to the charge of sexual assault of a child. He was sentenced on July 9, 1999 by a Texas state court to ten years in prison. Young did not file an appeal. It appears that Young's counsel timely filed a motion for new trial on August 6,

¹ This court denied Young's application to proceed *in forma pauperis* and ordered Young to pay the \$5.00 filing fee on or before July 8, 2005 (Dkt. 7). Young paid the filing fee on August 2, 2005.

1999.² The motion for new trial was denied by operation of law 75 days after imposition of sentence. TEX. R. APP. P. 21.8. Because of the timely filing of a motion for new trial, Young's conviction became final 90 days after imposition of sentence, or on October 7, 1999. Young filed an application for writ of habeas corpus in state court on December 8, 2003. The state court writ was denied without written order on the findings of the trial court on December 8, 2004.

Young filed this federal application for writ of habeas corpus on or about May 16, 2005.³ Young alleges that his attorneys were ineffective for failing to file an appeal of his guilty plea and resulting sentence.

ANALYSIS

Section 2244 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides as follows:

(d)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

² See Affidavit of Peter Justin, Exhibit 3 to petitioner's brief.

³ For purposes of the AEDPA, a federal petition generally is filed on the date it is placed in the prison mail system. See *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998). Because Young does not indicate the date his petition was mailed, the court uses the date of filing in the district court. The petition is so late that the exact date of filing is not material.

- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Young's one-year statute of limitations began on October 7, 1999 and expired one year later on October 9, 2000.⁴ Because his December 8, 2003 state writ application was filed after expiration of the limitations period, it did not further toll the limitations period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Young's petition does not present any grounds for equitable or statutory tolling of his limitations period.

⁴ Respondent argues that the conviction became final on August 9, 1999, thirty days after imposition of the sentence, ignoring the motion for new trial. The petition is time-barred whether the AEDPA's one-year statute of limitations began on August 9, 1999 or October 7, 1999.

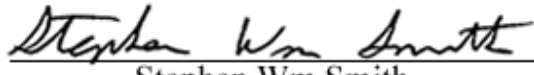
CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that petitioner's application for writ of habeas corpus be denied.

The parties have ten days to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error.

See FED. R. CIV. P. 72.

Signed at Houston, Texas on August 16, 2005.



Stephen Wm Smith
United States Magistrate Judge